

Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO and Albay Construction Company and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 342. Case 32-CD-143

August 31, 1994

DECISION AND ORDER QUASHING NOTICE OF HEARING

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

The charge in this Section 10(k) proceeding was filed on November 15, 1993, by Albay Construction Company (Albay), alleging that the Respondent, Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Albay Construction Company to assign work or continue the assignment of work to employees it represents rather than to employees represented by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 342 (Plumbers). The hearing was held on January 13, 1994, before Hearing Officer Jo Ellen Marcotte.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the record, the Board makes the following findings.

I. JURISDICTION

Albay, a California corporation, is engaged in the business of general contracting. During the past 12 months, a representative period, in the course and conduct of its business operations, Albay provided services at the Tassajara Project in excess of \$50,000 directly to the city of Pleasanton, California, which itself would meet the Board's jurisdictional standards, but for its exempt status. The parties stipulated, and we find, that Albay is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Plumbers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

In June 1992, Albay was awarded a contract for the underground installation of certain pipe at the Tassajara Reservoir and Pipeline Project. Albay subcontracted all of this work to Antovich Construction (Antovich). Albay is signatory to collective-bargaining agreements with both the Laborers and the Plumbers.

Antovich has no agreement with the Plumbers but is signatory to a collective-bargaining agreement with the Laborers. Antovich assigned the work to its employees represented by the Laborers.

Work on the project began sometime in the late summer or fall of 1992. On April 27, 1993, after the Laborers had been performing the work in dispute for several months and were nearing completion of that work, the Plumbers filed a grievance against Albay, alleging that Albay's subcontracting the work to Antovich was in violation of the subcontracting provision of the collective-bargaining agreement between Albay and the Plumbers. The work performed by the Laborers (the work in dispute) was completed in late April or early May 1993. By letter dated June 10, 1993, the Laborers informed Albay that it claimed jurisdiction over the completed work in dispute. Subsequently, on July 13, 1993, the Plumbers filed a complaint with the U.S. District Court for the Northern District of California to compel arbitration over its April 27, 1993 grievance against Albay. On November 15, 1993, Albay filed the instant unfair labor practice charge alleging that the Laborers had unlawfully threatened Albay with an object of forcing it to assign or continue the assignment of the work to the employees represented by the Laborers. By letter dated November 24, 1993, the Laborers advised Albay that enforcement of its claim for the disputed work would include strike action. A notice of a 10(k) hearing was issued on December 30, 1993.

B. Work in Dispute

The disputed work involves the installation of approximately 8000 lineal feet of 27-inch waterline and the installation of approximately 3400 lineal feet of concrete pipe on the Tassajara Reservoir and Pipeline Project located in Dublin, California.

C. Contentions of the Parties

Albay contends that a jurisdictional dispute exists under Section 10(k) of the Act. It argues that both the Plumbers and the Laborers have made competing claims for the work in dispute and that the Laborers' threat to strike constitutes unlawful coercion under Section 8(b)(4)(D). Finally, it maintains that the assignment of the work was properly made to the Laborers based on the relevant factors.

The Plumbers contend that no jurisdictional dispute is properly before the Board. It maintains that its dispute is with Albay's subcontracting the work to Antovich allegedly in breach of its collective-bargaining agreement with Albay, a matter that should be resolved through the contract's grievance procedure. It further maintains that Albay did not assign the work and that the Plumbers has never made a claim for the work performed by the Laborers, but merely filed a

grievance over Albay's subcontracting the work to Antovich. Further, the Plumbers argues that the work at the Tassajara Project was completed long before the alleged strike threat was made by the Laborers and that the Laborers could not do anything to enforce the assignment of work on the project after such work had been already completed. Finally, the Plumbers argues that the notice of 10(k) should be quashed as a matter of public policy because Albay is simply attempting to insulate itself from contract damages in the Federal court action filed by the Plumbers against Albay, rather than to protect itself from competing claims to an assignment of work. It argues that this misuse of the Board's process by Albay is inconsistent with the purposes of the Act, citing then-Chairman Stephens' dissent in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790 (1990).

The Laborers argues that a jurisdictional dispute exists because it must be determined which collective-bargaining agreement covers the work in dispute. It further contends that this is not an appropriate issue for the grievance procedure because jurisdictional disputes are precluded from arbitration under the contract.

D. Applicability of the Statute

In a 10(k) proceeding, the Board must determine whether there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. In the instant case, this requires a finding that there is reasonable cause to believe that one or both Unions used proscribed means to enforce their claim and that there are competing claims to disputed work between rival groups of employees.

As noted above, the Laborers claimed jurisdiction over the disputed work approximately 1 month after it was completed. Approximately 6 months after the work was completed, the Laborers advised that enforcement of this claim would include strike action. We find that, if there were competing claims for the work in dispute, this threat to strike would provide reasonable cause to believe that a violation of Section 8(b)(4)(D) occurred.¹

In the circumstances here, however, we find that there were no competing claims to the disputed work, and thus, that no jurisdictional dispute exists. At the time that the Laborers made its claim to the work and

its subsequent threat to strike the disputed work already had been completed. Thus, on June 10, 1993, when the Laborers advised Albay of its claim to the work, there was no work left to claim. Consequently, the Laborers' claim of jurisdiction over the completed work was an irrelevant and meaningless gesture, and the subsequent threat to strike to enforce that claim was meaningless.² In addition, we note that the Laborers' claim and subsequent threat were directed at the general contractor, Albay, who did not control the assignment of the work, and that Antovich, who did, had assigned the work to its employees who were represented by the Laborers. In these circumstances, we find that no bona fide competing claim to the disputed work was made by the Laborers.³

Based on our findings above, we conclude that there is no jurisdictional dispute properly before the Board for determination.⁴ Accordingly, we shall quash the notice of hearing in the instant matter.

ORDER

It is ordered that the notice of hearing in this proceeding is quashed.

²Cf. *Operating Engineers Local 3 (Oskins Electric)*, 308 NLRB 154, 155 (1992) (in which the Board found that the union's attempted disclaimer of the disputed work was invalid because the work was 90-percent completed at the time that the disclaimer was made and, thus, there was nothing left to disclaim).

³In agreeing with his colleagues that no jurisdictional dispute exists, Member Devaney relies solely on the fact that, at the time the Laborers claimed the work and subsequently threatened to strike, the work had already been completed.

⁴We recognize that the Board generally has held that "completion of disputed work on a particular job does not moot a jurisdictional dispute when, as here, there is nothing to indicate that a similar dispute will not arise in the future." *Electrical Workers IBEW Local 701 (Federal Street Construction)*, 306 NLRB 829, 830 (1992); see also *Electrical Workers IBEW Local 581 (National Telephone)*, 223 NLRB 538, 539 (1976). Here, however, we do not find that the dispute is mooted by the completion of the work; rather we find that no jurisdictional dispute ever existed within the meaning of Sec. 10(k) because no competing claims were made at any time when the work existed. By contrast, in the cases in which the Board has found that a jurisdictional dispute existed and was not mooted despite completion of the work in dispute, the claims to work and threats to enforce claims had been made while the work was in progress. A dispute had therefore arisen, even though the work was subsequently completed at some point in the Board's processes prior to the 10(k) hearing.

Member Stephens agrees that Laborers did not make a cognizable claim for the disputed work and, therefore, finds it unnecessary to decide whether the Plumbers' filing and pursuit of its grievance against Albay would constitute a competing claim for the disputed work under his position in *Laborers Local 731 (Slattery Associates)*, supra. Chairman Gould also agrees that the Laborers made no cognizable claim for the disputed work and, therefore, finds it unnecessary to address the propriety of the Board's decision in *Laborers Local 731 (Slattery Associates)*, supra.

¹It is well established that there is reasonable cause to believe that a violation of Sec. 8(b)(4)(D) has occurred if a labor organization that represents employees who are assigned the disputed work threatens to strike or otherwise coerces an employer to continue such an assignment. *Laborers Local 731 (Slattery Associates)*, supra; *Laborers District Council (O'Connell's Sons)*, 288 NLRB 53 (1988); *Sheet Metal Workers Local 107 (Lathrop Co.)*, 276 NLRB 1200 (1985); *Carpenters Local 1207 (Carlton Inc.)*, 313 NLRB 71 (1993).